

Best endeavours v. reasonable endeavours what do they mean? Do either mean anything

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Introduction

Find a commercial contract these days, and more often than not you will find frequent references to one party or other using their 'best endeavours' or 'reasonable endeavours' to achieve various contractual obligations. While both terms invoke an expectation of performance, they each carry an inherent risk of non-performance. As lawyers, our role includes assisting our clients to recognise and assess such risks, and to plan or mitigate against that risk. But in order to advise our clients, we must understand these terms ourselves. When a client is minded to agree a reasonable endeavours obligation, are we able to advise on what that client must do to fulfil those reasonable endeavours? Should a client ever accept a best endeavours obligation? Many lawyers would respond no, notwithstanding that their client is accepting absolute obligations throughout the same agreement.

Endeavours, whether reasonable or best, are less than an absolute obligation. But to what degree? Unfortunately, English case law has not always provided the clarity we need to advise with certainty.

The substance of the obligations

An obligation to use best endeavours has been held to constitute the following:

- > to do what can reasonably be done in the circumstances (with reference to a reasonable and prudent Board of Directors acting properly in the interests of their company (*Terrell v Mabie Todd & Co Limited* (1952) 69 RPC 234));
- > to leave no stone unturned (*Sheffield District Railway Company v Great Central Railway Company* (1911) 27 TLR 451); but
- > will not require actions which would be detrimental to the financial interests of the company or would undermine commercial standing or goodwill (*Rackham v Peek Foods Limited* (1990) BCLC 895).

In practice, a company subject to a best endeavours obligation:

- > must take all commercially practicable action (having regard to costs and degree of difficulty);
- > is required to incur reasonable expenses; and
- > may be a requirement to divert resources from elsewhere within the business where necessary.

The uncertainty is borne to a great extent from the fact that our Courts have used language similar to the above to define the extent of *reasonable endeavours*:

- > all relevant commercial criteria may be taken into account in determining what reasonable endeavours are (e.g. costs, uncertainties and practicalities relating to compliance) (*UBH (Mechanical Services) Ltd v Standard Life Assurance Co.*, *The Times*, 13 November, 1986); (*P&O Property Holdings Limited v Norwich Union Life Assurance Society* (1994) 68 P&CR 261).

However it is clear that the obligation is less onerous than that of best endeavours (*Jolley v Carmel Ltd* [2000] 2 EGLR 154).

In practice, a company subject to a reasonable endeavours obligation:

- > must take all commercially practicable action, but only to the extent that such action is not to the detriment of the obligor's commercial interests; and
- > is unlikely to be required to divert resources from elsewhere within the business.

Blurred lines

Some important distinctions arise throughout the delineation of these two terms, yet equally, courts have often been reluctant to affix unqualified criterion, rendering some such distinctions imprecise. For example, when subject to a best endeavours obligation, one must ignore (*some but not necessarily all*) commercial considerations, while the reasonable endeavours obligor may (*for the most part*) take all commercial considerations into account. The diversion of resources may be required under best endeavours, but it is *unlikely* to be required where reasonable endeavours are anticipated. Further, the relevant test for best endeavours is said to be *subjective*, while the reasonable endeavours test is *objective*, yet in applying this objective test the court *may* in *some* cases look to the previous conduct of the parties for guidance, thus introducing an inherently subjective element.

Recent decisions

Two new English court decisions may shed further light on how to interpret best endeavours and reasonable endeavours obligations.

In *Rhodia International Holdings Ltd. v Huntsman International LLC* [2007] EWHC 292 (Comm), the claimant ('Rhodia') had agreed to sell to the defendant ('Huntsman') its European chemical surfactants business. The sale included a site at Whitehaven, which was powered by a third party, Cogen, pursuant to an Energy Supply Contract with Rhodia. The Sale and Purchase Agreement ('SPA') required both parties to use 'reasonable endeavours' to obtain consent from Cogen for the novation to Huntsman of that third party supply contract. The reasonable endeavours obligation went on to include a specific and absolute obligation on Huntsman, if reasonably required by Cogen, to give a direct covenant with respect to the financial position of the relevant Huntsman Group company who would be taking novation of that third party supply contract.

Although the parties each claimed to have fulfilled their respective reasonable endeavours obligation to obtain Cogen's consent, Huntsman had not provided a direct financial covenant when requested by Cogen. Cogen continued to refuse to give consent to the novation of that contract, and Huntsman eventually sought to rely on relevant provisions of the SPA to refuse to take on Rhodia's performance responsibilities under that supply contract. When Cogen made a successful claim against Rhodia for non-payment under the supply contract, Rhodia brought subsequent proceedings against Huntsman, alleging that Huntsman had not used reasonable endeavours to obtain the novation. Mr Julian Flaux QC, sitting as the deputy High Court judge, held in favour of Rhodia, declaring that Huntsman could not rely on Cogen's refusal to consent to the novation as relieving it from any further obligation. By not giving the direct covenant, Huntsman was held to be in breach of its reasonable endeavours obligations. Huntsman was recently granted permission to appeal the decision, albeit not on the issue of the extent or performance of its reasonable endeavours obligation.

In *Yewbelle Ltd v London Green Developments Ltd & Anor* [2007] EWCA Civ 475, the appellants, KGL and Yewbelle ('Sellers') agreed to sell land to the respondent, London Green Developments ('Purchaser'), intending that the Purchaser would then develop that land and lease parts of it back to the Sellers. The sale was completed prior to execution of a planning agreement with the London Borough of Merton under section 106 of the Town and Country Planning Act 1990. While the Sellers couldn't guarantee that the s.106 planning agreement would be obtained, they were obliged under the sale agreement to use 'all reasonable endeavours' to secure such an agreement. Realisation of a s.106 agreement was in the Purchaser's favour as it would increase the commercial value of its acquisition, yet the Purchaser had the right to waive the Sellers' obligation. Owing to several complications, the Sellers failed to obtain a s.106 agreement and claimed to have rescinded the contract of sale, while the Purchaser accused the Sellers of failing to use all reasonable endeavours. The Court of Appeal endorsed Lewison J's analysis of what constituted all reasonable endeavours, (*Yewbelle Ltd v London Green Developments Ltd & Anor* [2006] EWHC 3166 (Ch)) but upheld the appeal in relation to his analysis of the facts, asserting that the Sellers had in fact used all reasonable endeavours.

These two recent cases appear to provide some guidance surrounding best endeavours and reasonable endeavours obligations in relation to three separate issues: the extent of such obligations, the distinction between the two, and the scope of an obligation to undertake a course of action expressly provided for in the contract.

Extent of the obligations

Both cases engaged in a detailed analysis of how far a party will be required to go before their respective obligations will be exhausted. At first instance in *Yewbelle*, the trial judge accepted the claimant's submission that there should be no obligation to go over the same matters repetitively once reasonable endeavours have been exhausted. On appeal, much turned on the belief that the reasonable endeavours obligation is a 'composite obligation', that is to say where such endeavours will fail to negotiate one obstacle, there is unlikely to be an obligation to continue to negotiate a second obstacle.

One of the factors complicating the s.106 agreement in *Yewbelle* was third party ownership of a portion of the land in question. The court held that there was no obligation on the Sellers to purchase that land from the third party in order to help facilitate the agreement, and thus neither a reasonable nor best endeavours obligation would incorporate a requirement to sacrifice the obligor's commercial interests.

In *Rhodia*, Mr Flaux QC confirmed prior authority for the proposition that there is no obligation to persuade a third party to change their mind simply because such persuasion might hypothetically (or equally might not) succeed. With regard to what would constitute *no prospect of success* (and thus an exhausted obligation), Mr Flaux QC referred in turn to each of the words 'real', 'substantial', 'significant', and 'worthwhile', thereby creating perhaps further uncertainty as to the true extent of a reasonable endeavours obligation.

Best v. Reasonable: what is the distinction?

The *Rhodia* decision in particular consisted of a lengthy discussion in obiter as to what the distinction between best and reasonable endeavours might be. Mr Flaux QC suggested that the difference lies in situations where a number of alternative reasonable courses of action are open to a party obliged to seek an end result. If that party is obliged to exercise *reasonable endeavours* to achieve the result, they must pursue one of these courses of action until it is exhausted. In contrast, a party subjected to a *best endeavours* obligation must pursue *all* reasonable courses of action until they are exhausted.

By this logic, Mr Flaux QC opined that '*all reasonable endeavours*' may equate to using best endeavours, rather than staking a middle position between best and reasonable endeavours. However, in seeking to establish the existence of a distinction between best and reasonable endeavours, Mr Flaux QC then cited contradictory authority in the form of *Jolley v Carmel Ltd* [2000] 2 EGLR 154, in which the court placed best and reasonable endeavours at opposite ends of a spectrum of varying obligation, with '*all reasonable endeavours*' couched somewhere in the middle. This ongoing uncertainty suggests that it might be best to avoid the term '*all reasonable endeavours*' where practicable.

It is worth mentioning that in *Rhodia*, no distinction was drawn between the traditionally American term, "*reasonable efforts*", and the common English law term "*reasonable endeavours*".

Specified courses of action

It is well established that neither a best, nor reasonable, endeavours obligation gives rise to an absolute obligation, since, if that were the intention, the parties would have agreed to include a more definitive term during negotiation (*Phillips Petroleum Company United Kingdom Ltd v Enron Europe Ltd* [1997] CLC 329). However, the decision in *Rhodia* places one important caveat on this general proposition, that is, where the contract actually specifies certain steps which must be taken as part of the exercise of reasonable endeavours, those steps must be taken, even where that may involve sacrificing commercial interests. Since Huntsman was required, under the terms of the SPA, to give a direct covenant if Cogen reasonably required it in connection with the novation, this obligation was held to be absolute, and seems ultimately to have been the main basis on which Mr Flaux QC held against Huntsman in that case.

Conclusion

An analysis of both old and new case law, leads inevitably to the following conclusions:

- > the precise meaning and extent of reasonable endeavours and best endeavours obligations remain uncertain; and
- > in each case, the facts of the particular circumstances, coupled with a common sense approach, will generally prevail.

However, both *Rhodia* and *Yewbelle* raise some interesting points. In particular, whereas in the past we may have seen the main difference between these various levels of endeavour as being the amount of effort required of the obligor (perhaps measured in terms of volume of resources allocated) we now see a distinction based not on pure level of effort but on the number of courses of action the obligor would be required to attempt.

We see also that where a particular course of action is specified in the reasonable endeavours clause, the court will expect that course of action to be achieved before the reasonable endeavours obligation is deemed to be fulfilled, even if that is ultimately not in the commercial interests of the obligor – an important caveat from the common principle that no action to the commercial detriment of the obligor will be required.

If a client requires a particular course of action, an absolute obligation should be incorporated into the relevant agreement. As seen in *Rhodia*, an alternative approach may be to combine an obligation to use reasonable endeavours or best endeavours (whichever has been agreed) with specific and absolute obligations to perform the course of action in question.

Where a client agrees to a best endeavours or reasonable endeavours obligation in a contract, they should not see this as a non-obligation; they should be advised to anticipate that some real endeavours will be required of them, especially if specific course of action is expressed as part of that obligation.

Whichever term is adopted – best endeavours or reasonable endeavours – the relevant party is not under an absolute obligation to fulfil the relevant task. There is, in effect, a contractual 'get out' for the obligor, which shifts the risk of non-performance back onto the other party. Non-performance of an *absolute* obligation carries with it the certainty of contractual remedies for breach. Non-performance of a 'best endeavours' or 'reasonable endeavours' obligation carries uncertainty as to whether what has been done by the relevant party is sufficient to fulfil the 'best endeavours' or 'reasonable endeavours' test. Two things remain: the risk for clients of non-performance; and (notwithstanding the new cases) the difficulty for lawyers in assessing, quantifying and advising on that risk.

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